CC Docket No. 02-33
Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities

Summary

Common Carriage vs. Private Carriage
Computer Inquiry Rules
Unbundled Network Elements

- Broadband wireline Internet access services are "information services" and standalone broadband transmission services are "telecommunications services."

- The classification of wireline broadband services have no effect on CLECs' rights to obtain and use network elements to provide standalone broadband transmission services and combinations of narrowband and broadband telecommunications and information services.

- There is no basis for creating a broadband exemption from the Bell's core Computer Inquiries unbundling and non-discrimination obligations.

- The Bells' "broadband investment" and "regulatory parity" arguments are baseless.

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Services That Bundle Internet Access And Broadband Transmission Are Information Services, And Standalone Broadband Transmission Services Are Telecommunications Services.

- Standalone Broadband Transmission Services
  - The Commission has also previously held that the Bells and other entities provide "telecommunications services" when they offer ISPs or other members of the public high-speed (broadband) transmission on a stand-alone basis, without a "bundled" Internet access or other information service component.

- Internet Access Services
  - The Commission previously held that even Internet access services that customers reach on a "dial up" basis through separately obtained local telephone service are information services, and not "telecommunications services."

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The Act forecloses the Bell's proposal to commence serving ISPs as "Private Carriers," exempt from sections 201 and 202

- Standalone Broadband Transmission services are telecommunications services
  - FCC cannot exempt these services from all of the Title II requirements by declaring them to be private carriage
    - service does not itself comprise or provide telecommunications;
    - ICB offerings "for which little demand exists"
  - wide variety of "standalone" high-speed transmission services (T1.5, hDSL, aDSL)
  - currently provided by ILECs under tariff "directly to the public"
  - Any effective Title I regime by necessity would require the ILECs to, in effect, provide service on a nondiscriminatory basis and to act as common carriers that would be subject, for that reason alone, to Title II of the Act.

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The classification of wireline broadband services has no effect on CLECs' rights to obtain and use network elements.

- Section 251(c)(3) gives CLECs the right to obtain "nondiscriminatory access to network elements" from the ILEC "for the provision of a telecommunications service."
  - the manner in which an *ILEC* chooses to use its facilities is simply irrelevant to CLECs rights under this section
  - a CLEC is entitled to use network elements as long as the *CLEC* provides a telecommunications service
- A CLEC has a statutory right to use network elements to offer combinations of telecommunications services and information services.
  - The FCC has already held that a CLEC may use the unbundled network elements that it leases to provide *any* information service so long as the CLEC also is using those elements to provide a telecommunications service.
  - Any effort to prevent a CLEC from using a loop it has leased to provide both broadband Internet service and voice service would violate section 251(c)(3)'s nondiscrimination obligations.
  - Supreme Court's recent *Gulf Power* decision provides an analogy supporting the use of lawfully obtained network elements to provide "commingled" services.

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There is no basis for creating a broadband Internet Access exemption from the core Computer Inquiries unbundling and non-discrimination obligations

- The *Computer Inquiries* obligations reflect the fundamental economic reality that unbundling and nondiscrimination rules are necessary to prevent ILECs from exploiting market power over basic transport to distort information services competition.

- There is no rational basis for a broadband exemption from the Computer Inquiries unbundling and nondiscrimination requirements.
  - Economics: each ISP must obtain the underlying basic service from the ILEC
  - Technology: no material difference between current and future generation technologies
  - Law: does not lower barriers, promote diversity of media voices, or preserve competition

- "Market-based" and other proposed alternatives to the Computer Inquiries safeguards are unworkable.
  - where an incumbent LEC has market power, and thus "superior bargaining power," and a potential competitor "comes to the table with little or nothing the incumbent LEC needs or wants," the resulting "agreements," if any, "would be quite different from typical commercial negotiations."

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The Bells' "broadband investment" and "regulatory parity" arguments are baseless

- Investment Incentives
  - TELRIC-based rates will not discourage any efficient investments
  - Loop investments for next generation broadband services are independently justified by the cost savings that the ILECs will realize in providing voice (narrowband) services.
  - An ounce of history is worth a pound of Bell theory. Notwithstanding their unbundling obligations, the Bells have made significant investments to respond to their data LEC and cable competitors.
    - the proliferation of DSL in the telecom industry has seen one of the fastest technology adoption rates ever recorded.
  - The "problem" would appear to be lack of demand.
- Regulatory Parity
  - Cable companies are regulated differently. (franchise fees, must-carry, PEG, requirements to share their networks for free)
  - Cable's core video services are subject to substantial competition.
    - 2 facilities based competitors in every local market with the capacity to serve every cable subscriber in the US.
    - In many markets additional competitors are present, C-band, MMDS, SMATV operators, broadband overbuilders, gas and electric utilities, etc.